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IN THE

# Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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No. 71-507

WILFRED KEYES, *et al.*,

*Petitioners,*

*vs.*

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, *et al.*,

*Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE

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## MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The undersigned, as counsel for the above-named organizations, respectfully move this Court for leave to file the accompanying brief *amici curiae*.

### Interest of the *Amici*

The B'nai B'rith was founded in 1843 and established its Anti-Defamation League as its educational arm in 1913. The American Jewish Committee was founded in 1906 and the American Jewish Congress in 1918. All three of these organizations are concerned with preservation of the secu-

rity and constitutional rights of Jews in America through preservation of the rights of all Americans. They believe that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all.

This case raises an important issue under the Equal Protection Clause of the Fourteenth Amendment, involving a form of discrimination recognized by this Court as abhorrent nearly eighteen years ago—segregation in public education. Here, the City of Denver, Colorado is maintaining what amounts to a segregated school system wherein minority students are being denied an equal educational opportunity.

The *amici* view the effect of the Denver school board's actions in administering its schools as having the same legal consequences as if separate schools were mandated by the board. Since these three organizations have consistently fought for equal opportunities for all, regardless of race, color, creed or national origin, and have opposed racial segregation in schools, they are deeply concerned about the impact of the decision in this case on future efforts to correct segregation in public schools.

The accompanying brief *amici curiae* is based on extensive concern and experience of the three organizations in matters involving discrimination against minorities. We argue that the harmful effects of segregation operate whether or not it is imposed by the state. In this connection, we show that this Court's conclusion in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) that segregated schools are inherently unequal rested on studies most of which apply equally to *de facto* and *de jure* segregation.

We argue further that measures designed to correct past illegal discrimination cannot be confined to the narrow area directly affected by the discrimination but must be broad enough to insure elimination of the effects of discrimination from all of the operations conducted by the discriminator.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for petitioners have consented. Counsel for respondents have informed us that the Denver school board had directed counsel to consent to requests to file *amicus* briefs only "upon written assurance that the person or organization requesting the consent will file a brief supporting the position of the school district."

May 1, 1972

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE*

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

### Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

## Opinions Below

The opinions of the District Court are reported at 303 F. Supp. 279 and 313 F. Supp. 61. The opinion of the Court of Appeals is reported at 445 F.2d 990.

## Statement of the Case

This case arises out of a school desegregation action brought by Denver school children and their parents in Federal District Court against the school board of School District No. 1, Denver, in 1969. Their complaint sought complete desegregation of the Denver public school system and provision of equal educational opportunities to all Denver school children.

The litigation was initiated after a newly elected school board rescinded a partial desegregation plan prepared by the outgoing board. That plan sought to alleviate high concentrations of Negro and Spanish-surnamed students in some schools and high concentrations of white students in others.

Evidence was introduced in the District Court to show a pattern of unconstitutional activity by the school board not only in the rescission of its desegregation plan for the Denver schools but also in its administration of the school system over the years (in its school site policies, attendance zones, etc.). In deciding on a motion for a preliminary injunction, the court ruled that the board had acted unconstitutionally, with respect to the Park Hill area in northeast Denver, in its action rescinding the original desegrega-

tion plan, and it preliminarily directed the school officials to implement the terms of the rescinded plan (App. 1a).*

These findings were reiterated by the District Court in its opinion on permanent relief (App. 44a). However, it there held that, as to the rest of the Denver schools, there had been no sufficient showing of a segregation policy on the part of the school board. It reached this conclusion even though it found that segregation existed in those schools as it did in those schools in which a segregation *policy* had been in existence (App. 66a).

The District Court also found that certain of the minority dominated schools were failing to offer their students an educational opportunity equal to that afforded white students in other Denver public schools (App. 89a). Because the court concluded that these schools were unequal largely because of their segregated character (App. 86a-87a), and also because, in a hearing on the question of remedy, the court found that desegregation was a necessary element in equalizing the educational opportunity (App. 112a), it directed the school board to desegregate and otherwise equalize the educational offering at these schools.

On appeal, the Court of Appeals for the Tenth Circuit agreed with the District Court both as to the segregation policy in northeast Denver (Park Hill) and as to the lack of a showing thereof as to other Denver schools (App. 122a-139a, 147a-150a). However, it modified the lower court's order to desegregate, insofar as it applied to schools out-

* References to (App. ) are to the Appendix to the Petition for Certiorari.

sids the Park Hill area, holding that the court could not order desegregation of schools which had not been segregated by official policy (App. 144a). The Court of Appeals thereby declined to overrule *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. den., 380 U.S. 914 (1965).

## Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the inferiority of facilities of those schools in the Denver school district attended predominantly by Negro and Hispano students of itself establish a violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Does racial segregation in the public schools operated by respondents constitute discriminatory state action in violation of the Equal Protection Clause, irrespective of the intent of the policies pursued by respondents?

3. Should the remedial order in this case be limited to that part of the school system operated by respondents in which intentional segregation was found?

## Summary of Argument

I. The record here plainly establishes the inferior quality of those Denver schools attended predominantly by Negro and Hispano students. The unconstitutionality of such unequal treatment was recognized even prior to 1954 and is sufficient, by itself, to require corrective action here.

II. Racial segregation, *per se*, is harmful to Negro students. To the extent that it is brought about by state action, it results in a denial of equal protection.

A. This Court held in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), that segregated schools are inherently unequal. *Brown* establishes that racial classification brought about by state action is *per se* a denial of equal protection.

B1. If racial segregation is brought about by state action, the Constitution is violated even if there is no showing that segregation was the intended effect of the state action. It is the result, not the motive, that determines the constitutionality of the program in question.

B2. Unconstitutional state action is shown where state agencies are intertwined in a racially classified program under circumstances in which the power of the state could be used to prevent or eliminate the racial classification.

B3. This Court's conclusion, in the *Brown* case, that segregated schools are inherently unequal was announced in the context of deliberately imposed segregation. However, there is no basis for assuming that it was confined to that context. In fact, of the six authorities cited by this Court for its conclusion, four applied equally to *de facto* segregation. Recent decisions in the lower courts have increasingly rejected the *de facto-de jure* distinction.

III. Any desegregation plan must encompass the entire school district and not merely those schools where an official segregation policy is shown to have had demonstrable ef-

fects. Beginning with this Court's decision in the *Brown* case, remedial orders in school desegregation cases have encompassed entire school districts. This is consistent with the general practice under antidiscrimination laws, under which violators are required to take remedial steps with respect to all their operations. It is consistent also with the practical consideration that effective desegregation requires involvement of the entire school district.

## ARGUMENT

### POINT ONE

**Inequality of public educational facilities is a violation of equal protection.**

Even prior to this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), it had long been established that inequality of racially separate, public educational facilities was prohibited by the Equal Protection Clause of the Fourteenth Amendment of the Constitution. See, e.g., *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sweatt* v. *Painter*, 339 U. S. 629 (1950). That is, as Judge Skelly Wright noted in *Hobson* v. *Hansen*, 269 F. Supp. 491, 496 (D.C., 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969):

> To the extent that *Plessy's* separate-but-equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance does not survive *Brown*. Nevertheless, to the extent the *Plessy* rule, as strictly construed * * * is a reminder of the responsibility entrusted to the courts for insuring that dis-

advantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes.

Similarly, the District Court in this case noted that, "if the school board chooses not to take positive steps to alleviate *de facto* segregation, it must at a minimum insure that its schools offer an equal educational opportunity" (App. 89a). Judge Doyle went on to find that such equal educational opportunity is not being provided. Thus, he listed 15 schools, all of which have at least 70-75% Negro and/or Hispano students, which fail to meet the absolute minimum Equal Protection standards (App. 76a). He cited factual data relating to achievement (App. 78a), teacher experience (App. 80a), teacher turnover (App. 82a), pupil dropout rate (App. 81a), and building facilities (App. 83a) in support of his conclusions.

Teacher experience is a key example. At the Anglo schools, nearly half the teachers have over ten years experience; the figure for the Negro/Hispano schools is less than one-fifth. In addition, nearly twenty-five per cent of the teachers in the Negro/Hispano schools have no previous experience in the Denver school system; less than ten per cent of the teachers in the Anglo schools have no previous experience (App. 80a).

We submit, therefore, that, even by pre-*Brown* standards, the Denver school board has deprived the students under its jurisdiction of the equal protection of the laws. This Court should therefore affirm the District Court's decision on the Second Count of the Second Cause of Action and reverse the Court of Appeals' reversal of that decision.

## POINT TWO

**Racial segregation discriminates *per se* against black pupils and, if brought about by state action, is a violation of the Fourteenth Amendment.**

### A. Segregated Schools Are Inherently Unequal.

In 1954, this Court held in *Brown, supra,* that separate schools are inherently unequal. 347 U. S. at 485. The Court plainly stated that segregated schools are incapable of providing quality education. It also said that the effect of segregation in the school system was to place an indelible stamp of inferiority on those Negro children who were compelled to attend "Negro" schools.

Since 1954, numerous court decisions and a number of socio-educational studies have reinforced the conclusions reached in *Brown.* One of the most important studies is "Equality of Educational Opportunity," published in 1966 by the United States Office of Education, which was prepared under the supervision of Dr. James Coleman. Section 30 of the Coleman Report is of particular relevance to the issue of segregated schools. It notes, at page 302, that "attributes of *other students* account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff." The Report further found that middle-class children have a heightened sense of motivation which induces a classroom atmosphere most conducive to learning and that Negro children showed educational improvement when introduced to such an atmosphere.

The Report also noted, at page 321, that school achievement was closely related to the student's sense of confidence and belief in the control of his own destiny. For many reasons, Negroes and other minority students are likely not to have confidence in themselves. By exposing them to the motivation to learn and sense of confidence of other (middle-class) children, their academic performance can be improved. And the only way to gain this exposure is by integration.

Several years earlier, this view had been expressed by the Board of Regents of the University of the State of New York. In a statement issued at its meeting of January 27-28, 1960, the Board said:

> Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

A third, more recent study, by the United States Commission on Civil Rights, entitled "Racial Isolation in the Public Schools," concluded in 1967 (at 193):

> The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be * * * Negro children believe that their schools are stigmatized and regarded as inferior by the

community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

The case law uses very much the same language:

> Racial concentration in his school communicates to the Negro child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of Negro children in racially concentrated schools to obtain equal educational opportunities is impaired * * * *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543, 546 (Mass. 1965), rev'd on other grounds, 348 F. 2d 261 (1st Cir. 1965).

> (I)t is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white. *Lee* v. *Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970), aff'd, 402 U.S. 935.

Therefore, it must be concluded in the words of Judge Doyle, that "segregation regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity" (App. 86a).

The net effect of the *Brown* decision, as these authorities show, is that racial segregation—and any form of racial classification or separation—constitute discrimination *per se* which, if brought about by state action, violates the Equal Protection Clause. It is the classification itself which violates the constitutional mandate because it nec-

essarily creates inequality. *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969), and cases there cited.

In this case, the record is clear that the school attendance districts, as established by the respondent school authorities, are racially segregated. Those acts of the respondents that determined the school districts, and the resultant segregation, established a racial classification of the very kind prohibited by the Fourteenth Amendment, as interpreted in the *Brown* case.

### B. Racial Segregation Brought About by State Action Is a Denial of Equal Protection.

#### *1. If the segregation is caused by state action, it is the effect that matters, regardless of motive or purpose.*

As the *Brown* decision held, state action by legislative fiat causing segregated schools is violative of the Fourteenth Amendment. It is not only legislative action in support of segregation that is in violation.

> Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil.

*Davis* v. *School Dist. of the City of Pontiac*, 309 F. Supp. 734, 742 (E.D. Mich., 1970), aff'd, 443 F. 2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971).

The concept of purposeful state action is not limited to an intent to cause segregation on the part of state officers.

If the action was taken with knowledge of the consequences and the consequences were not merely possible but were substantially certain, then the action is wilful and purposeful state action. This concept is well recognized in torts. *Restatement, Second,* Torts §500, comment f; *Mountain States Telephone and Telegraph Co.* v. *Horn Tower Construction Co.,* 147 Colo. 210, 363 P.2d 175, 179 (1961); *Commonwealth* v. *Welansky,* 316 Mass. 621, 55 N.E. 2d 902, 909 (1944). It has also been applied in criminal law. *People* v. *Conroy,* 97 N.Y. 62 (1884).

Furthermore, state action, even if not purposeful, violates the Constitution if it results in racial separation with its resultant inequality. There is no need to show motive, ill will or bad faith in invoking the protection of the Fourteenth Amendment against racial discrimination. *Sims* v. *Georgia,* 389 U.S. 404, 407-8 (1967). Furthermore, this Court has held, in a long line of cases dealing with equal protection of the laws, that racial discrimination may be established by proof of either purpose or effect. See *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) and, more recently, *Reitman* v. *Mulkey,* 387 U.S. 369 (1967) and *Hunter* v. *Erickson,* 393 U.S. 385 (1969). "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1961). Requirements which appear neutral on their face and theoretically apply to everyone, but have the inevitable effect of tying present rights to the discriminatory pattern of the past, are unlawful. *United States* v. *Louisiana,* 380 U.S. 145 (1965).

The concept that it is the effect rather than the intent that is of critical importance in assessing governmental

behavior with respect to the Fourteenth Amendment was applied to a public school desegregation case in a concurring opinion by Circuit Judge Stewart in *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853, 859 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956):

> The Board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and avoid 'racial problems' as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, *whatever motives the Board may have had* (emphasis supplied).

In areas other than race, this Court has invalidated discriminatory action by a state despite a lack of evidence of purposeful activity. Thus, there was no suggestion of intention to inhibit the poor in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). In the reapportionment cases, this Court held that the motive behind the challenged scheme of apportionment was immaterial. *Reynolds* v. *Sims*, 377 U.S. 533, 581 (1964). *Cf. Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

It follows that a state may not excuse action placing Negro citizens under a severe, unjustifiable disability on the ground that the action was inadvertent and without discriminatory intent. As Justice Clark said in *Kennedy Park Homes* v. *City of Lackawanna*, 436 F. 2d 108, 114 (2nd Cir. 1970), cert. den., 401 U.S. 1010 (1971): "Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it

cannot justify." That case involved a suit to compel the City of Lackawanna to allow the development of a low-income housing project at a certain location in the city. Just as the Denver school board, by the way it has drawn attendance district lines, has kept the minorities educationally segregated, the city in *Kennedy* had effectively kept Negroes residentially isolated in one area of the city through rezoning and other techniques. The Circuit Court called for an end to this course of action and for a conscious effort to alleviate segregation.

We submit that the law was correctly stated in *Hobson*, *supra* (269 F. Supp. at 497):

> Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of the Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a wilful scheme.

So, here, the Denver school board cannot argue that it did not intend the system to become segregated and unequal. If segregation and the resulting inequality exist as a result of the school board's failure to remedy the situation, the Equal Protection Clause has been violated.

### 2. *The Equal Protection Clause is violated if the state is entwined in the management of a discriminatory program.*

State action containing racial classifications outlawed by the Equal Protection Clause also arises when the state is "entwined in the management or control" of the private enterprise which discriminates. *Evans* v. *Newton*, 382 U.S.

296, 301 (1966). Or as was stated in a leading case involving school desegregation, responsibility for discrimination arises upon "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron*, 358 U.S. 1, 4 (1958).

That this is present in Denver is evident. The school board's every-day operations as well as its long-range planning show state participation in every aspect of the school operations.

The criterion for finding discriminatory state action violating the Equal Protection Clause is involvement of the state "to some significant extent" in any of the manifestations of discrimination. *Burton, supra*, 365 U.S. at 722 (1961). This Court said in that case: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" (*ibid*).

The issue in the *Burton* case was whether the Equal Protection Clause was violated by discriminatory action of a restaurant which had leased its premises from the Wilmington Parking Authority, a public agency. The state court held that the restaurant was acting in "a purely private capacity" under its lease, that its action was not that of the Parking Authority and was not therefore state action within the contemplation of the prohibitions contained in the Fourteenth Amendment. This Court disagreed. After discussing the various activities, obligations and responsibilities of the Parking Authority with respect to the restaurant, the Court found "that degree of state participation and involvement in discriminatory action

which it was the design of the Fourteenth Amendment to condemn". 365 U.S. at 724. It observed that the Parking Authority could have affirmatively required the restaurant to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation.

This brings the question of so-called *"de facto"* segregation here into focus. By its activities, the Denver school board has allowed and is allowing segregation, with its resultant inequality, to exist in the Denver schools. As in *Burton*, a public authority—the school board—has abdicated its responsibility. The Court there held that the involvement of the state in the discriminatory action of the restaurant was significant enough to warrant the conclusion that the Authority had violated the Equal Protection Clause. Similarly, state support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

### *3. So-called "de facto" segregation in public schools constitutes unconstitutional discrimination within the scope of the* Brown *decision.*

We submit that a school system where, as a result of a segregated residential pattern, white and black pupils generally attend different schools, amounts to a dual system which is in conflict with the Equal Protection Clause as interpreted in *Brown, supra*. This conclusion is rooted in language in *Brown* to the effect that (347 U.S. at 494):

> To separate [Negro pupils] from others of similar age and qualifications solely because of their race generates

> a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The issue before the Court in that case was "the effect of segregation itself on public education" (at 492). The Court said (at 493):

> We come to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.

As we noted above, the decision had the effect of equating state action that classified by race with a denial of equal protection.

The Court reached this conclusion in the context of deliberate imposition of a dual system by the school authorities. But it certainly did not hold that the constitutional prohibition of racial segregation is limited to segregation deliberately imposed by public authority. In fact, this Court accepted the finding that "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of the law" (347 U.S. at 494; emphasis added).

This language does not permit the conclusion that this Court was drawing a line, for constitutional purposes, based on whether the segregation had formal state sanction. This conclusion is reenforced by the fact that this Court, in concluding that "separate educational facilities are inherently unequal," relied on authorities that support that

conclusion regardless of the origins of the segregation. 347 U.S. at 494, footnote 11. When the six references in this footnote are examined, it appears that, in four of the six, nothing limits the finding to the case of deliberate official segregation.

The first authority cited is K. B. Clark, "Effect of Prejudice and Discrimination on Personality Development" (Mid-Century White House Conference on Children and Youth, 1950). This is a study showing that existing practices of segregation and discrimination damage the personality development of children. Its results do not depend in any way on whether the segregation found to be harmful has official sanction.

In the second authority, Witmer and Kotinsky, "Personality in the Making" (1952, c. VI), the chapter cited is entitled, "The Effects of Prejudice and Discrimination." It is in no way restricted to legally enforced segregation; indeed, that concept, is not even considered. On the other hand, the harmful effects of the kind of segregation involved herein is specifically noted in the following passage (at pages 136-7):

> Nevertheless, there are rural areas and sections of large cities in which Negroes and Mexicans, for example, rear their children considerably apart from others, and in which tradition gives stability to life. For children brought up in such circumstances the early stages of personality development are probably passed through with relative equanimity, so far, at least, as the influence of prejudice and discrimination is concerned.

> Difficulties for children so reared come when they leave home or when they move out of the close family circle to mingle with other youths in small towns and cities. Such a change is likely to take place at adolescence, the time at which a sense of identity should be in the making. Sudden exposure to the fact that they are not considered as good as other people is very disrupting to personality development.

The next two works cited are Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 J. Psychol. 259 (1948), and Chein, "What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities" (3 Int. J. Opinion and Attitudes Res. 229 (1949)). These studies were concerned only with "enforced segregation"; hence, they neither support nor negate the proposition that segregation not resulting from official action is likewise harmful.

Brameld, "Educational Costs," in *Discrimination and National Welfare* (MacIver, ed., 1949), 44-48, is similar to the first two works cited. This author is particularly concerned with what he describes as "concomitant learnings." He says (at page 46):

> They are learnings that cause boys and girls to develop prejudice, distrust, guilt feelings; that cause them to substitute over-simplified, stereotyped thinking for honest, particularized thinking about their fellow human beings. They are learnings that do not happen so much through books as through association on playgrounds, in corridors, in swimming pools, at parties, in the everyday experiences of living association *or of non-association.* (Emphasis supplied.)

The author concludes his recommendations for action (page 48):

> Finally, and perhaps most imperative, let us develop much more closely than we have thus far as an audacious conception of education which flows with the magnetic vision of an order in which all people are at last equal and free, not merely in theory, but in every aspect of day by day practice.

The portion of the sixth authority cited, Frazier, *The Negro in the United States* (1949), 674-681, is entitled, "Effects of Discrimination on the Negro." It is in no way restricted to enforced segregation. Indeed, it contains some observations squarely applicable here. Thus, the author states (page 677):

> One of the truly remarkable phases of race relations in the United States is the fact that whites and Negroes do not know each other as human beings. * * * Nor has the Northern white known the Negro since he has only reacted to a different stereotype. White Americans do not know Negroes for the simple reason that race prejudice and discrimination have prevented normal human intercourse between the two races.

The last sentence in the preceding quotation has particular significance for one aspect of this case. The school board has suggested that the separation of Negro and white children in Denver schools is merely the unfortunate result of race prejudice and discrimination, manifest in the form that restricts Negroes in the sale and rental of housing. As Frazier makes clear, the resulting segregation is harmful. The *Brown* decision in turn establishes that this harm is compounded when the pattern of segregation extends to the public schools.

School authorities have the obligation to avoid or minimize the harmful effects of school segregation. This obligation is an important factor to be considered in establishing construction policies and attendance zones. This the Denver school board has clearly failed to do. It is hardly reasonable to suggest that the Negro children in the Denver schools must continue to suffer the resulting harm merely because the school board did not expressly order that they go to segregated schools.*

Frequently the distinction is made between segregation imposed by the school board and segregation merely tolerated by the school board. But it is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.

The students involved in this action are in a publicly supported, mandatory state educational system. They must have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from anywhere from 70% to 99% of their white contemporaries.

The Denver situation *is* segregation by law, the law of the school board. It formulates attendance policies; it makes decisions as to school sites; it assigns teachers to

* School authorities "have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our early opinions distinguishing between integration and desegregation must yield to this affirmative duty being now recognized." *U.S.* v. *Jefferson County Board of Education*, 380 F.2d 385, 389 (5th Cir. 1967), cert. den., 389 U.S. 840.

various schools. In light of Judge Doyle's findings, the continuance of the board's policies amounts to nothing less than state-imposed segregation.

The lower Federal and state courts have increasingly recognized that whatever a school system does is state action and that "de facto" is a term used to justify avoidance by school boards of their responsibilities. Cf. *Barksdale, supra; Hobson, supra; Blocker* v. *Board of Education of Manhasset*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 871, 31 Cal. Rptr. 606, 382 P. 2d 878 (1963); *Branche* v. *Board of Education of Hempstead*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161, 212 A. 2d 1 (1965); *Brewer* v. *School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970), aff'd 427 F. 2d 1352 (9th Cir. 1970); *Crawford* v. *Board of Education of the City of Los Angeles*, Civil Docket No. 822-854 (Superior Court for County of Los Angeles, Feb. 11, 1970); *Bradley* v. *Milliken*, 433 F. 2d 897 (6th Cir. 1970), 438 F. 2d 945 (6th Cir. 1971), Civil Action No. 35257 (E.D. Mich. Sept. 27, 1971).

The *Blocker* case, *supra*, involved the action of a school board in New York in simply continuing an attendance pattern wherein all of the black elementary school children went to one school while virtually all of the white elementary school children attended two others. The Court said (226 F.Supp. at 223):

> The Fourteenth Amendment does not cease to operate once the narrow confines of the Brown-type situation are exceeded; the Supreme Court has made it clear that

it is the duty of the courts to interdict "evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" Cooper v. Aaron, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed. 2d 5 (1958), and has reaffirmed that objective in a recent decision on the subject. See Goss v. Knoxville Board of Education, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed. 2d 632 (1963). Viewed in this context then, can it be said that one type of segregation, having its basis in state law or evasive schemes to defeat desegregation, is to be proscribed, while another, having the same effect but another cause, is to be condoned? Surely, the Constitution is made of sturdier stuff.

The recent decision in *Spencer* v. *Kugler*, 326 F. Supp. 1235 (N.D. N.J. 1971), aff'd without opinion, 92 S. Ct. 707 (1972), might be viewed as inconsistent with this trend, since its effect was to leave a segregation situation undisturbed. However, *Spencer* is distinguishable from the instant case on two points. First, plaintiffs there sought to impose a state-wide desegregation plan across city and district lines. The court held that municipal lines were a reasonable standard for setting up school districts. 326 F.Supp. at 1240. Plaintiffs in the instant case are concerned with one district and one municipality only. Secondly, plaintiffs in *Spencer* sought to establish racial balance in the schools. Plaintiffs in the instant case are not seeking this. They do not ask for a certain ratio of black and white children but only the elimination of segregated schools.

More consistent with the current trend in the lower courts is the recent case of *Davis, supra*, which resembled more clearly the case at bar. The school board in Pontiac had engaged in a series of discriminatory practices, such as placing teachers in schools according to race and locating

new schools in such a manner so as to perpetuate existing segregation rather than remedy it. The court ruled that school districts may be held accountable for the natural, probable and foreseeable consequences of their policies and practices and that, where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that the policies are based on educationally required, nonracial considerations.

## POINT THREE

**Any desegregation plan must encompass the entire school district and not merely isolated schools.**

The outgoing Denver school board recognized serious deficiencies in many of the Denver schools, particularly the existence of segregation throughout most of the system. As a corrective measure the board passed Resolutions 1520, 1524 and 1531. The new board rescinded those plans but the District Court ordered them reinstated (App. 44a).

*Amici* urge that these plans, even if put into effect, are insufficient because they focus on only the all- or virtually all-Negro and Hispano schools.

In *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 21 (1969), this Court noted that desegregation plans must be designed to insure "a totally unitary school system for all eligible pupils without regard to race or color." A system can be said to be unitary when the schools are no longer racially identifiable. *Robinson* v. *Shelby County Board of Education*, 330 F. Supp. 837 (W.D.

Tenn. 1971). There *are* virtually two separate school systems within the Denver school district. Judge Doyle noted that at least fifteen schools had Negro-Hispano populations of over 70% (App. 76a). Moreover, 73.5% of all the white students in the system attend schools which are over 75% white (Pet. for Cert. p. 4). These schools are racially identifiable and, surely, a system-wide solution is called for.

Even historically separate school districts, where shown to be created as part of a state-wide dual school system or to have cooperated in the maintenance of such a system, have been treated as one for purposes of desegregation. *Haney* v. *County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *United States* v. *Crockett County Board of Education*, Civ. Action 1663 (W.D. Tenn., May 15, 1967). The situation in Denver is tantamount to a dual system within the same district. Hence, it is more clearly necessary to treat its schools uniformly.

A further example is the case of *Pate* v. *Dade County School Board*, 434 F. 2d 1151, 1153 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971), where a desegregation plan which left twenty-two schools all- or virtually all-Negro was found "unacceptable". The case is analogous to Denver because the solution proposed by Judge Doyle would leave the schools in northeast Denver all- or virtually all-Negro and Hispano.

In *United States* v. *Watson Chapel School District No. 24*, 446 F. 2d 933 (8th Cir. 1971), a freedom of choice plan was found unconstitutional where 94% of Negroes stayed in all-Negro schools. The Denver percentage may not be quite as high, but the principle is the same.

When this Court issued its decision in the *Brown* case, applicable to four separate school systems, it did not direct the lower courts to search the record to determine which part of each system had been affected by the statutorily imposed requirement of segregation. It was taken for granted that the corrective measures to be imposed would apply to each system as a whole. Since then, desegregation cases, whether *de jure* or *de facto*, have resulted in system-wide desegregation plans. See, e.g., *Davis* v. *School District of City of Pontiac, supra; Dandridge* v. *Jefferson Parish School Board*, 332 F. Supp. 590 (E.D. La. 1971).

The principle that arises out of the cases cited above, we submit, is that the pool of resources for the correction of unconstitutional segregation in a school district is the whole district—not just the particular part where the impact of a segregation policy was shown. If correction of past illegal segregation cannot be achieved without involving the whole district, the whole district must be involved.

This is fully borne out by this Court's most recent decision on the scope of remedy in desegregation cases, *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). That case involved a challenge to a desegregation plan which treated the City of Mobile as if it were two cities. The eastern portion of Mobile had a 94% Negro population and the schools were 65% Negro; in the western part of the city, the schools were 88% white. The desegregation plan treated each area separately, leaving nine elementary schools in the east 90% Negro and over half of the junior high and senior high school Negro students in all- or virtually all-Negro schools. This Court said (at 38):

On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning. For these reasons, we reverse the judgment of the Court of Appeals as to the parts dealing with student assignment, and remand the case for the development of a decree "that promises realistically to work and promises realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

There is nothing novel about the concept that measures designed to remedy racial discrimination may appropriately apply to all of the operations of the discriminator. Administrative agencies enforcing antidiscrimination laws do not confine their remedial orders to the narrow area affected by a particular act of discrimination. The owner of an apartment house who has illegally denied an apartment to an applicant because of his race is not told merely to stop discriminating with respect to that apartment. He is barred from discriminating with respect to the entire building. Normally, indeed, he must keep the antidiscrimination agency advised of vacancies in other apartments so as to ensure that the complainant or other applicants of the same race are given an opportunity to obtain suitable accommodations. Analogous procedures are used in the case of an employer who violates a fair employment law. His entire payroll is reviewed and kept under supervision to ensure that the administrative agency's corrective order effectively terminates discrimination throughout the operation.

So, here, effective action against the unconstitutional discrimination found by the trial court requires action dealing effectively with segregation throughout the school sys-

tem operated by the respondents. Nothing less, we submit, would achieve desegregation.

Desegregation orders rest on the conclusion, aptly stated by Judge Wright in *Hobson, supra* (269 F. Supp. at 504-5) that:

> Segregation "perpetuates the barriers between the races; stereotypes, misunderstandings, hatred, and the inability to communicate are all intensified." (Footnote omitted.) Education, which everyone agrees should include the opportunity for biracial experiences, carries on, of course, in the home and neighborhood as well as at school. In this respect, residential segregation, by ruling out meaningful experiences of this type outside of school, intensifies, not eliminates, the need for integration within school.

We submit that comprehensive segregation would not be the result of the plan for the City of Denver approved by the court below. The result will be, rather, continued segregation and the maintenance of all-Negro and all-white schools. We believe that, for the reasons stated above, this Court should not stop short of a solution that encompasses the entire Denver school system.

## Conclusion

Even on the narrowest grounds, this Court should reverse the Court of Appeals. There is clear evidence here of unequal facilities in at least 15 of the Denver public schools and, under any standard of Equal Protection, these schools require remedial attention.

But this case goes farther than that. Nearly 18 years ago, this Court condemned racial segregation in public

education and ordered its elimination. These rulings dealt with the hard fact that Negro students in predominantly Negro schools get an education which is inferior to the education which they would receive, and which white students do receive, in schools that are integrated or predominantly white.

Whom are we dealing with here? In Denver, we are dealing largely with children in grades kindergarten through 6, i.e. from age 5 to 12. They are not capable of distinguishing between the total separation of all Negroes pursuant to a State statute based on race and the almost identical situation prevailing in their schools by reason of school districting and other policies followed by respondents. Simply stated, *amici* urge this Court to recognize that the operation of a public school system is state action and that, when a school system tolerates separation of the races and the resulting offering of inferior education, there is a denial of equal protection to the isolated minority group students.

We urge this Court that it is time to declare that, as to schools operated by public agencies, there is no such thing as *de facto* segregation. The segregation in the Denver schools stems from state action in one form or another. *"De facto"* is merely a term invented to justify school boards in ignoring the racial consequences of their actions.

Approval now of the *de facto-de jure* distinction would undermine 18 years of progress in the educational field since *Brown*. It would defeat attainment of the goal implicit in this Court's decisions since *Brown*—to protect school children and offer them as equal an education as possible within a given district. The statutes and regulations explicitly requiring dual systems have disappeared.

Yet segregated and therefore unequal educational opportunities within the same city and within the same districts still exist. And they exist despite the knowledge by local school boards that their actions intentionally or inadvertently, but necessarily, maintain and widen the educational gap between the races. This Court can make it clear in this case that the Constitution bars this manifestation of inequality in public affairs, as it bars all others.

**For the reasons stated above, we respectfully submit that the decision below should be reversed.**

Respectfully submitted,

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